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HEARINGS

Before The

SUBCOMMITTEE ON AIR AND WATER POLLUTION

COMMITTEE ON PUBLIC WORKS

UNITED STATES SENATE

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AIR AND WATER POLLUTION

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EXECUTIVE SESSION

AIR AND WATER POLLUTION

TUESDAY, JUNE 29, 1971

United States Senate,

Subcommittee on Air and Water
Pollution of the Committee
on Public Works,

Washington, D. C.

The subcommittee met at 10:20 a.m., pursuant to call,
in room 4110, New Senate Office Building, Senator Edmund S.
Muskie (chairman of the subcommittee) presiding.

Present: Senators Randolph, Muskie, Bayh, Montoya, Tunney,
Bentsen, Cooper, Boggs and Beall.

Also present: M. Barry Meyer, counsel, Thomas C. Jorling,
minority counsel, Harold H. Brayman, Leon G. Billings, Philip
T. Cummings, Richard D. Grundy, Bailey Guard, Mr. Brecker,
Mr. Westman, Mr. Rathway and Mr. Maynard.

Senator Muskie. Shall we begin?

Mr. Jorling. The section titled Minimum Standards, which
appears on Page 37, has, I guess, three principal functions.
One is to make it clear that any Federal effluent standards
of whatever nature, toxic or new source performance standard
or the minimum, and States are free as stated later, in Title
5, to establish more stringent standards in any area they

1 care to under their own law.

2 The second aspect appears in Subsection b, which is
3 an attempt to provide an incentive so the minimum standard
4 is not translated into a maximum standard in practice, and
5 the technique that is proposed is to require that when a
6 State issues a certification under what is now Section 21(b),
7 and which will be Section 401 under this act, when it files
8 a certification that contains an effluent standard, which is
9 equivalent to the Federal standard, it has to accompany that
10 certificate with a statement of justification why the minimum
11 is in effect adequate to protect the water quality standards
12 of the State.

13 So that they do have to consider whether or not a more
14 restrictive effluent standard is necessary. So it is a procedural
15 device to make the State think about the correlation of the
16 discharge to the water quality and not simply proforma attach
17 the Federal minimum to the certification.

18 The third aspect is one that I think Leon wants to touch
19 on, and that is in conjunction with the implementation plan
20 and that deals with whether or not the statute should state
21 what is now the practice, and that is whether the Federal
22 Government should establish as a matter of law a secondary
23 treatment or secondary treatment equivalent for industrial
24 sources should be enacted specifically in the statute.

25 Whether we should say that all implementation plans must

1 provide at the minimum for secondary treatment municipal
2 treatment and secondary treatment for industrial sources.

3 That is the third element. It doesn't appear in Section
4 403, but it is one we have to consider.

5 In the way of background, the interpretation under the
6 existing 1965 Act is that secondary treatment is the minimum
7 necessary to achieve any use designation or water quality
8 standard in any State, and therefore, the Federal Government
9 has only approved implementation plans where secondary treatment
10 has been provided.

11 The secondary treatment has a useful concept in the case
12 of domestic sewage treatment, biological treatment system.
13 When you move into the area of industrial treatment, the secondary
14 concept must be redesigned.

15 The Administration has undertaken to redesign secondary
16 treatment for purposes of industrial discharges for 22 classes
17 of industrial pollution. They are calling these the secondary
18 treatment equivalents. They have not yet received the results
19 back from the contractors developing these defined secondary
20 treatment equivalent standards, so we don't know what they look
21 like.

22 In effect, they have taken what they consider to be the
23 interpretation of the 1965 Act presently interpreting it
24 administratively for purposes of industrial treatment. The
25 question we have to face is do we stay silent on it or do we

specifically provide statutory underpinning for this secondary treatment equivalent for industrial sources.

Senator Muskie. As a minimum.

Mr. Jorling. As a minimum.

Mr. Billings. With the exception of one community in Iowa, all interstate standards provide for a minimum secondary treatment for municipal and industrial waste. As Tom points out, the industrial waste equivalent is presently being defined.

As far as municipal waste treatment, secondary treatment has a meaning. It may not be a particularly useful meaning, but it is an effluent standard against which all municipals must perform. It gives the Administration a basis against which to judge the adequacy of treatment.

On the question of industrial equivalents, if the Committee takes a course of establishing National standards for new sources of pollution, National standards and/or prohibition for toxic pollutants, and provides a mechanism for the regulation of waste which would not lend themselves to biological treatment, the concept of secondary treatment, as presently applied to municipal waste would also apply to the remaining industrial waste, and we would eliminate the vague question of secondary treatment or the equivalent aspect of it.

It seems to me, because of the present administrative practice and the approved plans requiring secondary treatment,

1 the Committee should consider adding it to the bill.

2 Senator Muskie. Well, the Administration is developing
3 these equivalents in connection with this permit.

4 Mr. Billings. That is correct. But the standard specifies
5 that the industrial waste shall receive the equivalent of
6 secondary treatment under the approved plan for interstate
7 streams.

8 Senator Muskie. How many States are now using that in
9 their plans?

10 Mr. Billings. As far as I know, all 54 jurisdictions.
11 But the problem has been heretofore it hasn't been defined.

12 Senator Boggs. When you say 54 jurisdictions, what are
13 the other four?

14 Mr. Billings. Puerto Rico, Guam, the District of Columbia
15 and the Virgin Islands.

16 Senator Muskie. We would not have a definition in the
17 language?

18 Mr. Billings. Of the equivalent secondary treatment,
19 no, we wouldn't. As I say, if we adopt the procedure set
20 forth relative to toxic pollution, new sources of pollution
21 and regulation of other pollutants, which do not lend themselves
22 to conventional biological treatment, we wouldn't need a
23 definition, because everything else would fall within the
24 general interpretation of secondary treatment. It would no
25 longer be an equivalency problem.

1 Senator Muskie. In other words, all the others are bio-
2 logical waste?

3 Mr. Billings. Basically, yes. Under the procedure the
4 staff has set out in this print, minimal would only apply to
5 biological waste, because you have National standards for the
6 others.

7 Senator Muskie. If we put the minimum in, what would be
8 the relation between this minimum and the provision we have
9 written for toxic waste?

10 Mr. Billings. There would be no relationship, as such,
11 because that concept secondary treatment doesn't have any
12 meaning when applied to toxic waste.

13 Senator Muskie. The language would simply exclude those?

14 Mr. Billings. You would have basically waste that would
15 lend themselves to biological conventional treatment handled
16 under the implementation planning section, and all other waste
17 would be subject to another regulatory procedure.

18 Mr. Jorling. I would add, as a matter of law, the States
19 would be free to establish, assuming that the Federal standard
20 on a new source or toxic substance were less than a prohibition,
21 the law would provide that the State could establish a pro-
22 hibition if it chose to.

23 They would always retain the right to go beyond what
24 the Federal Government establishes even in the case of new
25 sources. For instance, in Delaware, to permit the State to say

1 no discharge, no facilities, no construction. The State would
2 retain the authority to say even though you meet the new
3 source performance standard for the Federal Government for a
4 refinery, as a matter of State law, we are precluding refineries
5 from being located on our coast. They would retain that
6 authority.

7 Senator Muskie. What is the Administration doing with
8 respect to the biological treatment for toxic waste?

9 Mr. Billings. They are interpreting the Refuse Act as
10 authorizing them or providing authority to regulate the dis-
11 charge of toxic substances to the extent necessary to eliminate
12 toxicity.

13 Senator Muskie. How do the Members of the Committee
14 react to the suggestion?

15 I think it makes sense.

16 Senator Boggs. I think it is a generally accepted standard,
17 and I think that is what we have to try to get, something that
18 is generally accepted. It means something. They understand it.
19 I think that goes a long ways. When you get too technical and
20 too many ramifications in there, it is no good.

21 Senator Muskie. Authorize the Administrator to set
22 secondary treatment and give him the authority he is now exer-
23 cising?

24 Mr. Billings. We would have to identify what secondary
25 treatment means for the purpose of implementation plans.

1 As I say, when we go back to the Administration and check
2 the need to define equivalent, it may not be necessary,
3 because of other regulatory procedures because of the waste
4 that don't lend themselves to the secondary treatment.

5 For your information Senator Bentsen, you may know, the
6 State of Texas has required secondary treatment for all waste
7 for 20 years. As a matter of fact, this is true generally in
8 any water-short State. In any State that has a limited water
9 supply, secondary treatment and chlorination has been a matter
10 of public health policy for years.

11 Senator Boggs. How does it relate to water quality standards,
12 stream standards? Does it conflict with it?

13 Mr. Billings. This is the debate that has gone on for
14 years. It is a debate, by the way, that has been largely
15 resolved. The State of Missouri, for example, the City of
16 St. Louis, would argue that secondary treatment is not necessary
17 to protect water quality in the Mississippi, that primary
18 treatment would be adequate.

19 However the standards submitted for the State of Missouri,
20 for discharges in the Mississippi, require secondary treatment,
21 so the issue has been resolved administratively.

22 Senator Boggs. So as a practical matter, you would have
23 to have stream standards as well as these minimums required?

24 Mr. Billings. You would have stream standards, the minimum,
25 and to the extent that the minimum did not implement the stream

1 standard, you would need a higher treatment standard. To the
2 extent that the stream standard did not require that minimum,
3 you thus are achieving improvement in water quality.

4 There is, by the way, an argument made by the public health
5 people that anything less than secondary treatment presents
6 a continuing public health problem, because of the bacterial
7 deposits.

8 Senator Boggs. I think anything less than that is risky.

9 Senator Muskie. All right, let's conclude it then.

10 Senator Cooper. Can I ask something here? Do we have
11 standards now for industrial effluents in the present Act?
12 Do we have any standards for industrial discharges?

13 Mr. Billings. Again, under the guidelines issued on May 9,
14 1966, industrial effluents are required to meet a standard
15 which is described as secondary treatment or its equivalent.

16 Senator Cooper. Have we written into law, in the old Act
17 as amended, any standards for industrial discharges or is this
18 the first effort?

19 Mr. Billings. The only standards in the law would be those
20 which apply to oil, which we set as being administratively
21 defined as oil in harmful quantities. Other than this, the
22 Congress has not acted to prescribe specific effluent standards
23 for industry.

24 Senator Cooper. This is our problem right now.

25 Does the practice of the Administration under the Refuse

1 Act require an equivalent to what is the present plan of
2 municipal waste?

3 Mr. Billings. That is a little fuzzy. Under the Refuse
4 Act, there are three standards, the equivalent of secondary
5 treatment for non-toxic waste, a specific quantitative limitation
6 on toxic waste and the best technology available for new sources
7 of pollution.

8 Basically that is what we are writing into the law. That
9 is basically what both the Administration and the Chairman's
10 bill provided.

11 Senator Muskie. The next item is definitions, Page 38.

12 Senator Cooper. Is it possible to get an equivalent
13 under present technology or anticipated technology or
14 within the time limits we set for an equivalent to be achieved?

15 Mr. Billings. Senator Cooper, I don't know. That term
16 creates a lot of problems for me, but according to the testimony
17 that Senator Eagleton took in the scientific panel, and Senator
18 Tunney was there, the witnesses who testified on the state of
19 the art of industrial waste treatment technology -- and I think
20 Dick could confirm this -- said that in most cases, with the
21 possible exception of petrochemical, it would be possible
22 or technically practical to apply a no discharge standard.
23 In fact, this is a standard which is being applied in many
24 instances for new plants.

25 Senator Cooper. What equivalent means is that you are

1 acquiring a percentage reduction as you would apply it to
2 municipal waste?

3 Mr. Billings. We don't know that, sir, because they have
4 all of these equivalency tests out on contract, and we don't
5 know what they are going to say when they come back.

6 Mr. Jorling. It might be helpful to get hold of a contract
7 and see what they ask the contractors to come in with.
8 If it is a percentage reduction, if secondary treatment for
9 domestic sewage means 90 percent reduction of organic material,
10 does the contract say give us a 90 percent reduction of the
11 pollutant defined as steel and paper, and so on, and then we
12 might have some idea of what it is they meant by equivalency.

13 I think I will ask for a copy of the contract.

14 Senator Tunney. You know, we are trying to get from EPA
15 a better analysis as to what the impact would be of the
16 standard that I offered as a suggestion several weeks ago,
17 recreation standard, and the first information they sent to
18 us was a bit thin. So I have been back to Mr. Ruckelshaus
19 again and asked him to fatten up the files a little bit, but
20 they obviously had people down there who had thought about it.

21 Jeff Greenfield indicated to me he thought it was a very
22 good standard. So we are in the process now of getting that
23 information and I would assume that what we are talking about
24 now, secondary treatment, that we are in no way deciding when
25 we accept this secondary treatment standard that the recreational

1 standard is not a viable standard as far as this Committee goes.
2 We may decide that, but I hope we are not deciding it now.

3 Senator Muskie. No, this is under the section on minimum
4 standard.

5 Mr. Billings. This is treatment as opposed to water use.

6 Senator Tunney. Fine.

7 Mr. Billings. Mr. Chairman, on the question of definitions,
8 the existing law is silent on a number of issues, and the staff
9 would like to call the attention of the Members to those and
10 perhaps the best thing would be to read the specific definition
11 which are new and significant.

12 Starting on Page 39, Definition F is the term pollutent.

13 (COMMITTEE INSERT:)
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1 Mr. Billings. The staff will point out that the inclusion
2 of dredge spoil and radioactive materials are controversial.

3 Mr. Jorling. I would also add that the definition is
4 one that is built upon the Refuse Act program. It has been
5 argued that the Refuse Act is superior among others for the
6 reason that it is all inclusive with respect to the ability to
7 control the discharge of refuse and refuse is defined as
8 basically everything and anything, and that then gives the
9 ability to control pollution in sufficient scope to achieve the
10 objective.

11 This is an attempt to bring under the 1965 Act to Federal-
12 State the same kind of scope, and the same kind of coverage
13 of the materials that can affect water quality.

14 Senator Muskie. Why don't we just say including refuse?
15 (Laughter.)

16 Senator Tunney. That makes sense to me. (Laughter.)

17 Mr. Jorling. If I might speak to the radioactive material
18 aspect, under the Atomic Energy Act of 1954, as amended, there
19 has been litigation on the question of whether or not the
20 States have residual power to establish more strict standards
21 than those established by the Atomic Energy Commission.

22 The Minnesota case I am speaking of began with the premise
23 that the AEC's pre-emption was not complete. They failed at
24 the Court of Appeals level. The State has indicated that it is
25 going to seek appeal.

1 Our feeling was, and I think it is supportive in a
2 fair reading of legislative history, that the State did retain
3 authority under the 65 Water Pollution Control Act as amended
4 in 1970 to establish more restrictive requirements for radio-
5 active discharge from any stationary facility in that State.

6 This would clarify that issue. This would clearly indicate
7 that, because of the way we have written the State section
8 later on. It says the States are free to establish any
9 more restrictive requirement than the Federal Government.

10 This would make it clear that the State could establish
11 more restrictive emission or effluent discharge requirements
12 on those facilities in those States.

13 Mr. Billings. I think the added point is there has never
14 been any question that the State would have authority to
15 establish water quality standards for radioactive material.
16 The question is to implement the water standard the State
17 would establish discharge regulations on the nuclear plants
18 more restrictive than those to be imposed by the Atomic Energy
19 Commission.

20 The staff feels the State has to have the authority to
21 implement more restrictive standards.

22 Senator Bentsen. How do you reconcile the objective of
23 keeping channels open and still not pollute the streams?

24 Mr. Billings. The argument goes to the disposition of
25 dredge spoil, not to the dredging itself. The question is,

1 the people who argue for maintenance of navigable waterways
2 say the most economic way of disposing of the material is to
3 dump it into deep lakes and other places. The dispute will
4 come over the fact that there probably is no way to dump dredge
5 spoil without violating water quality standards; therefore,
6 you are going to have to dispose of it on land or in some other
7 way.

8 Senator Bentsen. It becomes unrealistic sometimes.

9 Mr. Jorling. There is another area the Committee addressed
10 itself to last year on the same question. In the Omnibus Rivers
11 and Harbors Act, we provided that the Corps of Engineers shall
12 construct dredge spoil sites, disposal sites.

13 What they do is purchase land and dike it off so that the
14 material will not filter back into the water and discharge the
15 dredge spoil there. This was deemed to be necessary for the
16 Great Lakes and the coastal area where the dredge spoil is
17 contaminated.

18 Chemicals are accumulated in the spoil and disposing of
19 it is a discharge of polluting materials.

20 The other aspect of the problem is that some dredge spoil
21 is clean, in a sense. These, as provided under the 1970 amend-
22 ment, can be discharged into receiving waters because we
23 require the State to establish temporary standards. In other
24 words, they would cause a violation at a given time of turbidity
25 standards, but they should provide for temporary turbidity

1 standards which would permit the disposal of inert or non-
2 polluting dredge spoil.

3 I think the Rivers and Harbors Act of last year provided
4 the facility to dispose of all the spoil adequately in a
5 reasonable manner. I will look up the provision.

6 Senator Cooper. I don't believe we ever reached a solution
7 last year. We urged the Corps to buy areas for the disposing
8 of it, but did that prevent them from disposing in the Great
9 Lakes.

10 Mr. Jorling. The requirement of the section basically
11 states as soon as the areas are available, then no more open
12 water discharging of contaminated spoil.

13 Senator Cooper. What are we doing with this Act, maintaining
14 the provision?

15 Mr. Jorligg. I think it would simply provide that the
16 water quality standard established by the State should accommodate
17 dredge spoil. In effect, trigger this provision so that inert
18 materials could be disposed of consistently with temporary
19 turbidity standards and contaminated materials would have
20 to be discharged in diked areas, and the Omnibus Act provides
21 for the Secretary of the Army to establish those areas.

22 I think when read together it does provide a reasonable,
23 comprehensive program.

24 There is a larger issue that will have to be faced. There
25 is another public policy growing that the filling of marshlands

1 or wetlands which are often the dike areas, is to be discouraged,
2 so that problem will have to be confronted by later decision-
3 makers.

4 But this does provide for the establishing of the dike areas

5 Senator Cooper. Were funds authorized?

6 Mr. Jorling. There was an appropriation authorized. There
7 is also a matching fund. The States have to provide 25 percent
8 of the cost.

9 Senator Tunney. There is no question that the language
10 that we have in this Act with regard to dredge spoil is con-
11 sistent with the language of the Omnibus Rivers and Harbors
12 Act? It is consistent and it dovetails?

13 Mr. Billings. Yes.

14 Senator Tunney. Good.

15 Mr. Billings. I might point out if the Act were successful
16 in eliminating toxic pollutants and many other non-inert sub-
17 stances, then the problem of disposing of dredge spoil would be
18 much less.

19 The accumulation of these waste coming from industrial
20 deposits would be greatly reduced and might even result in
21 lowering some of our dredging costs.

22 Senator Bentsen. Just as a side remark, have you read
23 David Rockefeller's current speech on the trade-offs and cleaning
24 up the environment?

25 Mr. Billings. No.

1 Senator Bentsen. It is pretty good.

2 Senator Muskie. Are there any other questions about this
3 definition?

4 Mr. Billings. Mr. Chairman, the definitions include the
5 definition for the term ocean, which goes back to the fact that
6 the staff recommends a regulatory procedure for discharge of
7 waste into the ocean. Eventually the Members are going to have
8 to discuss the relationship of this to the proposed dumping
9 legislation on which the Commerce Committee claims jurisdiction.
10 I don't think that has to be addressed at this point.

11 Definition L is the term applicant water quality standard
12 and this has been changed slightly to read this way: The term
13 applicant water standard means water use designation --

14 Tom, maybe you ought to take this one.

15 Mr. Jorling. We have eliminated the concept of index so
16 that it would adopt the definition that appears in N and it
17 would read as follows:

18 (COMMITTEE INSERT:)

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1 Senator Muskie. The water use definition means the uses
2 which are or shall be permitted and protected.

3 Do we want to use the word protected? The use of the word
4 protect tends to act as an enhancement of water quality.

5 Senator Boggs. Yes, it could be construed that way. We
6 don't need the word.

7 Mr. Billings. Effluent limitations.

8 Senator Tunney. That is Definition O. Have L and N been
9 told together?

10 Mr. Billings. Yes.

11 Senator Muskie. What was that?

12 Mr. Billings. L and N have been put together.

13 Senator Muskie. I see.

14 Mr. Billings. In definition P, then, we define discharge
15 to include ---

16 Senator Cooper. Looking at G and H, I assume that G would
17 speak of interstate waters. Would you include all tributaries
18 as part of the boundary across a boundary? I notice you have
19 a limitation on the next one.

20 What is intended to amount to tributaries as far as G is
21 concerned?

22 Mr. Billings. Senator, this was one of the surprises of
23 the interpretation of the 1965 Act. The Senate had thought
24 when it enacted water quality standards for interstate waters,
25 it included the tributaries.

1 The administrative interpretation was that the non-inter-
2 state tributaries were not covered. Thus the water quality
3 standard program we have today only covers 14 percent of the
4 Nation's surface water rather than what the Committee thought
5 would be 80 percent.

6 Thus in order to make a distinction between those now
7 covered by administrative interpretation and those not, the term
8 intrastate waters includes the tributaries.

9 Senator Bentsen. You mean interstate?

10 Mr. Billings. No, the distinction is for the purpose of
11 extending coverage to those waters which do not presently have
12 approved water quality standards applicable to them.

13 Mr. Jorling. Again, this is in part brought on by the
14 Refuse Act. The Refuse Act interpretation of navigable waters
15 included navigable waters and tributaries thereof. This
16 extends this. When taken with the rest of the act, this
17 would extend the reach of this act to be identical with the
18 reach of the Refuse Act.

19 Senator Muskie. Do these two definitions now clearly
20 encompass all surface water?

21 Mr. Billings. With the three-mile limit and the 12-mile
22 limit, I think we pretty well have all the waters in the world.

23 Mr. Jorling. In California there is one lake which does
24 not fall within this definition, Lake Tulare. It has no
25 egress and ingress, apparently.

1 Senator Tunney. It has ingress but no egress. Sometimes
2 the lake exists and sometimes it doesn't.

3 Mr. Billings. The definition the staff relies on in this
4 legislation for the interpretation of navigable water is the
5 Federal Power Commission's interpretation.

6 Senator Muskie. How big is Lake Tulare?

7 Senator Tunney. In some years it doesn't exist. It is
8 just a dry field, and then when you have heavy rains, Lake
9 Tulare sometimes can be as much as 20 miles long. It is never
10 very deep, eight to ten feet deep. But it is very hot and
11 you have tremendous evaporation that takes place there in the
12 summer time. It is in the central valley and the thing can
13 evaporate in one summer.

14 I had a question on "O", where you say discharge from
15 point sources, because I guess that doesn't cover agricultural
16 drainage, does it?

17 Mr. Billings. The term discharge does, on the next page.

18 Mr. Jorling. I think we have to identify point sources or
19 define point sources because of the grey area that exists
20 between what everybody would agree is runoff from large areas and
21 what everybody would agree is a point source. Specifically
22 this goes to the issue of Federal lots.

23 The Administration under the Refuse Act has defined as
24 point source, for the purpose of establishing an effluent
25 limitation, any Federal lot that has 750 dairy cows and 1,000

1 beef cattle. So that we may have to address ourselves
2 specifically to define what a point source is for the purpose
3 of establishing an effluent limitation as distinguished from
4 what we have also proposed and that is general land use controls
5 over broad runoff.

6 For instance, prohibiting farmers from depositing manure
7 on frozen fields. That isn't effluent limitation, but it is
8 a control to keep organic material from reaching waterways.

9 Mr. Billings. This is not an area on which the States
10 are silent. Even though the Federal programs have been silent
11 on Federal controls, such States as Kansas have fairly comprehensive requirements imposed on Federal lots.

12 Texas also has control over Federal lots. They don't
13 allow any discharge at all.

14 Senator Tunney. There is no question then that a smart
15 attorney trying to argue a case for a farmer who had substantial,
16 we will say, pollutants, or let's just say that he was putting
17 on lots of fertilizer, nitrites onto his soil, and that these
18 nitrites were then running down just through the normal percolation
19 into either underground rivers or washing into surface rivers,
20 let's say into a bay area such as might exist in San Francisco,
21 which nitrates would then have an adverse effect upon the ecology -
22 there is no question this Act would cover those farmers and the
23 amount of fertilizer they are putting on the soil?

24 Mr. Billings. I think there is a great question. We have
25

1 proposed inclusion of the section which is not in this draft,
2 which would require the State to come up with implementation
3 plans for the purpose of regulating agricultural pollution,
4 but the Members haven't addressed themselves to either the
5 nature of that section or the capability of the Federal Govern-
6 ment to enter in the absence of effective State control.

7 Mr. Jorling. It does. The issue at the first level is
8 whether you control by effluent requirements or other means
9 of control, and in that instance you describe would be more
10 one of rates of application or controls over application, timing
11 and rates.

12 Another area that we also are confronted with is erosion
13 runoff from construction sites. When highways are built there
14 is a considerable amount of soil dislodged and made readily
15 available for erosion, and also in subdivision construction.

16 These things are not subject to effluent limitation but
17 State plans require catch basins in the area. Under an
18 interpretation of the Department of Transportation, Federal
19 highways assistance is available for catch basins to prevent
20 erosion from highway construction.

21 This would require the State implementation plan. Calif-
22 ornia has this. Most of the States do not. The State Water
23 Quality Board does require that erosion be limited and
24 controlled from construction activity in the State of California.
25 But the mechanism of control is different.

1 Senator Tunney. Just as a point of interest, I am sure
2 most of you are aware of it, but in California one of the
3 reasons we don't have good fishing any more on the coast is
4 because of the pesticides that have been applied to fields and
5 the fertilizers that have been applied to fields and they run
6 off and are going into the bays and into the coastal areas,
7 and this is having a devastating impact on fishing.

8 I just want to make sure that I understand what we are
9 talking about in this bill, because apparently this Act then
10 will not regulate this kind of activity, the application of
11 pesticides and the application of fertilizers.

12 Mr. Billings. Senator, the difficulty with such things
13 as pesticides, fertilizers or detergents for that matter,
14 is probably the best regulatory mechanism would be one which
15 regulates them at the point of manufacture as to their pollution
16 potential rather than trying to regulate them at their point
17 of application.

18 Once they are on the land, you are not going to be able
19 to regulate their discharging in the environment.

20 Senator Muskie has a Bill, S.573, which will provide a
21 premarket testing mechanism for these kinds of pollutants that
22 get into the environment indirectly and provide the Administra-
23 tor with authority to set standards for those kinds of pesticides
24 and detergents and so on.

25 Senator Bentsen. I would agree strongly with that. Even

1 if you could get the legislation, enforcement would be impossible.
2 The source of manufacturing is the best place to control it.

3 Mr. Billings. You perhaps read the story about the guy who
4 got angry and threw a gallon jar of dieldrin into a lake in
5 Ohio and wiped out everything in it just as a prank. This
6 happened just a couple of days ago.

7 As long as there is this kind of stuff on the market,
8 people are buying it and using it.

9 Senator Boggs. Are those bills referred to this Committee?

10 Mr. Billings. S. 573 is. The Administration has a bill
11 which refers primarily to agriculture, which will come to
12 Congress in this committee. They also have a toxic substance
13 bill, which we will also have a chance to look at, but S. 573
14 differs from those in that it relates only to pollutants which
15 once they are in the environment will have an adverse effect
16 on water quality; in other words, can't be controlled at the
17 point of discharge.

18 Senator Boggs. Should we consider something in this bill
19 or leave that subject for separate legislation?

20 Senator Muskie. Was that covered in the hearings?

21 Mr. Billings. In the hearings last year we got into the
22 issue of detergents in some degree. We did have testimony
23 on pesticides.

24 Mr. Grundy. In Kansas City we had testimony on fertilizer.

25 Mr. Billings. The string would be thin on some aspects of

1 the issue. As to the mechanism of premarketing testing for
2 example, we have had no direct testimony.

3 Mr. Jorling. Which is the most controversial aspect,
4 how does the Federal Government get involved in whether or
5 not to produce a product.

6 Mr. Billings. I point out the House may act on the question
7 of detergents in their decision.

8 Mr. Bentsen. Tom, why is that a problem?

9 Mr. Jorling. There isn't a precedent for it. I think the
10 concern among industry, particularly detergent manufacturers
11 and pesticide and fertilizer manufacturers, this would be the
12 first time the Federal Government had extended its reach into
13 their corporate decision making on the question of what is to be
14 produced and what isn't to be produced, what kind of protection
15 is afforded them.

16 They have already made some distinction between the effect
17 of a drug and the supportability of Federal regulation and the
18 effect of a fertilizer and the supportability of Federal
19 intervention.

20 Senator Tunney. I never was able to get the time to
21 develop the issue last year, but I had a doctor come to me
22 from the central valley, who wanted me to use in my campaign
23 the fact that because of heavy application of fertilizers,
24 nitrites in the soil in the central valley, heavier than needed,
25 you had a percolation of these nitrites into the water, which

1 nitrites then were drawn up in well water, and when babies,
2 particular in this particular area, Mexican-American babies,
3 take in water with a high concentration of nitrites, it produced
4 significant brain damage, and retardation.

5 This doctor told me that there were many, many cases of
6 brain damage related to this nitrite intake by small babies.
7 Apparently it doesn't affect the adult so much, but the baby
8 from the age of one day to six months.

9 I personally think this is something that this committee
10 at some point ought to address itself to and maybe this isn't
11 the legislation to do it, but I don't think we ought to wash
12 our hands of the issue, because of the powerful farm lobby.

13 I just unfortunately wish that I earlier on had spoken
14 to you, Mr. Chairman, about the issue, and to Leon, but I
15 just suddenly realized, as we were reading through the bill
16 here that apparently that wasn't really covered by the legisla-
17 tion, and I do think at some point we ought to address ourselves
18 to it, because it is a significant source of pollution.

19 We have almost eliminated our crabs in the San Francisco
20 Bay because of pesticide runoff.

21 Mr. Billings. The new print will have Section 304 and that
22 will give us an opportunity to see the extent to which land
23 use, land management, management of application of the
24 fertilizers and pesticides can be a tool in regulation, but I
25 very much doubt that will get to the point you are really trying

1 achieve.

2 Senator Muskie. I think we probably really should have
3 hearings on that problem.

4 Well, is there anything more in the definitions?

5 Senator Cooper. I have a question. Are you saying the
6 definition of pollution would not cover fertilizers and pesti-
7 cides?

8 Mr. Jorling. I think it does.

9 Mr. Billings. It does cover them, Senator, but we don't
10 have a control mechanism.

11 Mr. Jorling. They would be covered in the standard of
12 receiving waters, but to go to the source is the difficulty.
13 It would probably cover some of the dose problems, the over-
14 dose of pesticides and over-dose of fertilizers, but that is
15 not going to eliminate completely the problem Senator Tunney
16 describes. That is going to take a more rigorous control on
17 the product itself.

18 Mr. Billings. You can set the standard, but you don't
19 have a way to implement the standard until you get to the point
20 source of the manufacture.

21 Senator Cooper. Are there other sections in this bill
22 which will address themselves to heat?

23 Mr. Billings. Heat as a pollutant discharge from electric
24 generator facilities is presently covered under the water
25 quality standard under the 1965 Act.

1 Mr. Jorling. The States primarily control that.

2 Mr. Billings. Mr. Chairman, as to other definitions on
3 Page 40, I suggest we defer on these until we go back to the
4 specific sections on toxic pollutants when we go back through
5 the bill, because they are more relevant in terms of the
6 sections to which they refer.

7 Senator Boggs. Just for example on that, may I ask, like,
8 "15 hundred parts per million," how would you arrive at a figure
9 like that?

10 Mr. Westman. This was arrived at by taking the water
11 quality criteria set in 1968 and looking through the range of
12 toxic substance, looking at the highest level in tissue that
13 causes significant damages as far as the Public Health Service
14 is concerned, and that at a level of 15 hundred parts per
15 million causes significant problems.

16 Now one of the problems is that most of the organisms
17 in the tissues which have been analyzed, have stopped with fish,
18 and they haven't gone to birds and other things that eat the
19 fish where the tissue concentration would be higher. But that
20 is how it was arrived at.

21 Senator Boggs. There is an acceptable standard to reach
22 this 1500 parts per million that would be generally acceptable.

23 Mr. Billings. We have asked EPA to review this, Senator
24 Boggs.

25 Mr. Westman. We talked to two ecologists on the advisory
panel.

1 Senator Muskie. Is this any concentration under 1500
2 parts per million, that definition?

3 Mr. Billings. If a concentration less than that would
4 cause an adverse effect as a toxic pollution.

5 Senator Muskie. I see. All right.

6 Mr. Billings. Mr. Chairman, the next issue is on Page 41,
7 citizen suits.

8 I might point out for the Members that the emergency powers
9 provision is substantially the same as the emergency powers pro-
10 vision of the Clean Air Act.

11 On the citizen suits, I defer to counsel.

12 Mr. Jorling. Why don't you precede it with a statement
13 of the reaction to the citizen suit provision that we got so far
14 from the House to indicate what we are up against?

15 I think that goes to, well --

16 There is a citizen suit provision in the Clean Air Act
17 Amendment. This varies from it in some very important aspects
18 and the provision that is in the staff print is the provision
19 very close to the provision as adopted by the Senate, as
20 distinguished from the provision that finally became law.

21 The main differences are as follows: The provision that
22 became law requires notice be given by the person before he
23 actually files his petition in the Federal District Court. This
24 does not require a prior notice of intent to bring the action
25 either by filing notice against the alleged discharger or with

1 the Administrator.

2 The second thing under the provision as finally adopted,
3 there was a waiting period after notice was filed. Of course
4 this waiting period is not included in this provision.

5 Another important distinction in the provision that became
6 law in the Clean Air Act, the action against the Administrator
7 is limited to mandatory actions. This provision is, as the
8 provision passed the Senate, extended to both mandatory as well
9 as discretionary duties.

10 The fourth difference does not go to the Clean Air Act
11 section, but is included here because of the elimination of the
12 present 1965 Act enforcement which enables the Governor to
13 ask the Administrator to initiate enforcement action where
14 pollution in one State is affecting his State.

15 This provides, for purpose of this section, a Governor is
16 a citizen, and can use this authority to require the Adminis-
17 trator to enforce a violation of a water quality standard in
18 another State where it is affecting his State.

19 Mr. Billings. This was called to our attention because
20 when we wiped out the conference procedure in the Clean Air
21 Amendment, we also wiped out the opportunity of a Governor to
22 seek an action against interstate air pollution, and the staff
23 determined that the best way to preserve the rights of a State
24 affected by activity of another State was through this pro-
25 vision rather than trying to reconstruct that old conference

1 hearing procedure.

2 Mr. Jorling. Some of the newer Members weren't present
3 when we went through the discussions on the Clean Air Act
4 section. There has been some criticism regarding this.
5 One, that this will have the effect of encouraging harassment
6 or frivolous litigation.

7 Two, that the Federal Courts are already overwhelmed with
8 litigation loads. And in response to these kinds of assertions,
9 the Committee in the Clean Air Act and in the Congress finally
10 enacted some section or some provisions which are defined to
11 limit the effect on harassing and frivolous litigation,
12 principally in Subsection (d) of the staff print, which you
13 might want to read through.

14 But in order to discourage people from bringing frivolous
15 harassing action, this provision, if such action is brought,
16 the Court can award cost to the defendant. And this should
17 discourage plaintiffs from bringing actions unless they are
18 pretty sure they have a sound substantive issue, because
19 the Court will award cost to the defendant, and the defendant's
20 cost in this kind of a case, if the defendant is United States
21 Steel, would be high.

22 So this should discourage suits being brought unless it is
23 a very sound issue of fact on the question of violation.

24 So that is what Congress concluded last year in the Clean
25 Air Act.

1 Senator Boggs. Do we have that same language in this?

2 Mr. Jorling. Yes.

3 Phil, did I miss any point of distinction between the
4 sections in the Clean Air Act?

5 Mr. Cummings. You did not discuss the bond provision, which
6 we finally adopted in conference.

7 Mr. Jorling. The Clean Air provision is basically a re-
8 statement of the Federal rules. It provides that if the
9 petition is for temporary restraining order, the Court can,
10 after consideration of the equity of the situation, require
11 bond to be filed by the plaintiff.

12 The provision only goes to temporary restraining orders,
13 and it is likely most actions brought under this will not go
14 for TRO's, except where there is caveat for alleged violation
15 or toxic substance standards.

16 But generally it would be anticipated that the action
17 will be brought more for permanent restraining orders, and
18 therefore, the bond requirement would not be required. Many
19 people initially reacted to the provision of the Clean Air
20 Act by saying that the bond requirement negated the effect of
21 the provision, because it simply meant nobody could file the
22 kind of bond to seek a restraining order against, say, United
23 States Steel, and therefore the action was, in effect,
24 taken away with the left hand while given with the right hand.

25 Senator Bentsen. As we passed it last time, it provided

1 the 60-day notice.

2 Mr. Jorling. Yes, the notice requirement is for the
3 execution of administrative enforcement either at the State or
4 Federal level. On the theory that these may be the first notice
5 of an alleged violation that these agencies have, therefore,
6 notice should be required.

7 Senator Bentsen. If you have a procedure under way by
8 the Administrator, is there any limitation as to the type of
9 suits being filed during that time?

10 Mr. Jorling. This question that you raised was addressed
11 in the Committee report. After concluding the variety
12 of situations that could present themselves, such as actions
13 being brought in the District Courts by several plaintiffs,
14 and actions being brought by private plaintiffs and the State or
15 Federal agency was so diverse that the Courts will have to use
16 their discretion, and under the Federal rules decide how they
17 will handle this.

18 Senator Bentsen. Didn't the Act provide no private action
19 be entertained at the time?

20 Mr. Jorling. I don't recall. I don't think the Senate
21 provision -- I would have to check this -- had that kind of
22 provision.

23 Senator Bentsen. The law as finally passed?

24 Senator Cooper. I think I raised a lot of these questions
25 in the Committee last year. I believe a lot of the language

1 in the Act was language which I suggested.

2 Senator Bentsen. It seems to me that type of law is
3 necessary to stop the multiplicity of suits when all we are
4 really trying to do is penalize the violator and try to
5 accomplish the objectives of the standard we are setting forth.

6 Another question is of venue. Let's suppose that we have
7 an action of pollution in the State of Kentucky -- forgive me,
8 the State of Texas.

9 Does this mean they bring suit in the State of New York?

10 Mr. Jorling. I don't know whether the final Act had a
11 venue.

12 Mr. Cummings. Yes, it did. One purpose was not so much to
13 restrict the suits as to limit the problems of multiplicity
14 of suits. Federal Courts can consolidate cases effectively
15 only if they are in the same district, and to avoid the
16 objections, we had about many, many suits on the same problem, we
17 restricted venue to the usual kind of thing.

18 Senator Bentsen. But that is not done in this draft?

19 Mr. Cummings. No.

20 Senator Bentsen. Again, it would seem to me that would
21 be something we should do.

22 Mr. Jorling. One of the questions that the staff has
23 created by proposing a provision at variance with the Clean
24 Air Act provision is one of raising the technical or strategic
25 question. One, would the Senate have a more argueable position

1 if it went into the conference with an identical provision
2 to the Clean Air Act, saying there is no variation. It is
3 already law; that the law developed under this Act should be
4 identical to the law developed under the Clean Air Act, or
5 should it go into conference with a provision which in
6 technical sense is stronger or with less procedural problems
7 as far as the petitioner is concerned?

8 Senator Bentsen. I am a little of the school that
9 likes to try to pass out good legislation and not just something
10 to bargain with.

11 Mr. Jorling. I think there is pretty general agreement
12 from industrial lawyers as well as environmental lawyers that
13 the Clean Air Act is a soundly based, procedurally adequate
14 provision.

15 This is a good question, Senator, and I think all the
16 Members should be aware of it. This suit arises in the context
17 of other citizen suit provisions. On the Senate side, these
18 are principally in the Commerce Committee, where a bill
19 introduced by Senator Hart and Senator McGovern has been the
20 subject of hearings, and I understand is presently in sub-
21 committee markup, or very close to subcommittee markup, which
22 would establish a common law right of action for pollution,
23 with any citizen.
24
25

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1 Again, in the language of the bill, that there was
2 unreasonable pollution. This is modeled after a statute which
3 has become law in the State of Michigan. There are several other
4 States presently considering it.

5 I don't know whether any additional States have passed it.
6 Only one decision has been reached in the State of Michigan
7 under the Michigan Class Action Common Law Environmental
8 Section, and that was where a petitioner asked a court to
9 establish an emission standard for automobiles in the State
10 of Michigan.

11 The court declared that portion of the provision uncon-
12 constitutional on the basis it was unlawful delegation to the
13 judiciary of legislative authority.

14 I personally believe that it is not sound legislation as
15 it applies to pollution control, because the whole reason
16 for the existence of the Clean Air Act is to try to establish
17 what is pollution and what isn't pollution.

18 I do think it might have merit as administrative review
19 proceeding on project determinations of agencies regarding the
20 environment, like the Corps of Engineers, the Federal Power
21 Commission and what have you. But as far as establishing a
22 standard of pollution, I think it comes up short.

23 Whether or not it will ever be enacted by Congress is
24 another question, but it is before a different committee and
25 this provision should be considered in that context.

1 Senator Cooper. Has the Committee on the Judiciary also
2 been working on trying to develop a statute referring to
3 citizen suits?

4 Mr. Jorling. I think the Judiciary Committee considered
5 another provision dealing with consumer class actions, and
6 on the Floor when that bill was considered, I believe the
7 members of the Judiciary Committee indicated that they would
8 prefer that this legislation come from the Judiciary Committee.

9 The Commerce Committee is presently considering not only
10 the environmental provision, but also the consumer class action.

11 Senator Bentsen. Mr. Chairman, I would support legislation
12 in line with the Clean Air Act so far as citizen suits. I
13 think this is something that apparently has been debated at
14 length, and finally by consensus they have arrived at the citizen
15 suit procedure, which apparently is working very well as far as
16 the Clean Air Act.

17 I think since that has been well defined previously, and
18 since we have other new areas that are going to be quite
19 controversial, that we will be exploring with the House in
20 conference, I prefer we concentrate on those others.

21 Senator Muskie. I think there are two points of the citizen
22 suit provision of the Clean Air Act which we ought to give
23 some attention to. One is the question of whether or not it
24 ought to apply to discretionary action of the Administrator.

25 If the Administrator is given a great deal of discretionary

1 authority it bears directly on this. It may be just as
2 much subject to question by a concerned citizen as some of
3 his mandatory acts.

4 One way around that problem is to make more of his
5 authority mandatory instead of discretionary. I think that is
6 one point we ought to consider.

7 Secondly, there is some criticism that 60 days notice is
8 unnecessary delay.

9 Senator Bentsen. You have a protection in there in the
10 case of imminent danger to the problem of health that is not a
11 requirement.

12 Mr. Billings. Under the Clean Air amendment, the notice
13 is not required for toxic discharge, is that correct? So the
14 only notice that is required is on a violation of the effluent
15 standard or the emission standard or the scheduled compliance
16 basis, is that correct?

17 Mr. Jorling. Yes, sir.

18 Mr. Billings. On the difficulty with the 60 days on a
19 violation of effluent standard, the question has been raised.
20 As far as a time schedule compliance, it is not a great problem.
21 With the effluent standard, we are saying in essence, once you
22 have discovered a continuous discharge violation, then you must
23 give 60 days of continued continuous discharge violation before
24 you can bring an action.

25 That is the complaint that has been raised by the people

4
1 who would use this suit.

2 The effluent standard is not accomplished until the polluter
3 has had that period of time with which to come into compliance.
4 Let's assume he has three years. Three years later, he is
5 supposed to be meeting the effluent standard.

6 You are saying you are going to give him an extra 60
7 days. That is where the criticism comes in.

8 Senator Bentsen. Frankly, I don't think it is a big deal
9 compared to the idea of getting the Administrator to carry out
10 his responsibility and duty. I think the Chairman has brought
11 up a question that has to be probed, and that is concerning
12 discretion.

13 Senator Muskie. Let's get an analysis of mandatory and
14 discretionary authority. We might also consider on the 60
15 days, making it 45. You have got to give the Administrator
16 some time to look at the case.

17 Senator Bentsen. I am a pretty good half-a-loaf man. I
18 would say 45 days. (Laughter.)

19 Mr. Billings. Otherwise, make it identical to the
20 Clean Air provision.

21 Senator Muskie. We don't like bureaucratic lag, but
22 the fact is that 45 days is not an unreasonable period of
23 time to give the Administrator time to focus on the problem.

24 Senator Tunney. Under the Water Quality Act proposal
25 citizen suit, I see a problem where an industry could be

1 in compliance with an implementation plan that was established
2 by the State or the Administrator, and a citizen suit would
3 be brought against the industry that was in compliance,
4 saying that the implementation plan was inadequate according
5 to the Administrator's own water quality standard.

6 And this could be, you know, a legitimate claim on the
7 part of the citizen and yet as far as the industry is concerned,
8 he is meeting the standard of the implementation act.

9 Now, shouldn't we have some understanding that if an
10 industry is certified as meeting the implementation plan that
11 prima facie he is meeting the water quality standard established
12 by the Administrator and the citizen then has to bring a suit
13 against the Administrator rather than against the industry?

14 I think that would only be fair under the circumstances
15 rather than making the industry have to bear the burden and
16 expense of litigation.

17 Mr. Cummings. There is a provision intending to restrict
18 that kind of collateral attack on the approval of implementation
19 plans and other action of the Administrator. Basically the way
20 it works out, if you don't get a crack in 30 days in the allowable
21 review time for seeking judicial review, it is not subject to
22 attack in the citizen suit or any other enforcement proceeding.
23 That is found on Page 45.

24 Senator Tunney. So you don't feel it is a problem?

25 Mr. Cummings. We intend to restrict that as much as possible.

1 Mr. Jorling. I think the intention of the citizen suit
2 provision is to allow a petition to be filed only where there
3 is an alleged violation of administration requirements. Anybody
4 who wants to attack it on the water quality standard or the
5 implementation plan itself, must seek redress through the
6 judicial review. He must do that within 30 days of the
7 approval by the Federal Government of the implementation plan
8 or after information has been developed to show that it is
9 inadequate.

10 It is hoped to make sure that intent is in fact reflected
11 in the reading of the citizen suit with the judicial review.

12 Senator Tunney. I think that is awfully important.

13 Senator Muskie. Senator Randolph, who is chairman of
14 the full committee, would like to bring up a matter out
15 of order in light of the extra attendance we have at this
16 moment.

17 If there is no objection, I yield to Senator Randolph.

18 Senator Randolph. Thank you, Mr. Chairman.

19 I spoke to Ed rather quickly and to Senator Cooper. We
20 have now the veto on Senate 575 and it will come to the Senate
21 papers and it was anticipated, as I believe all Members of the
22 Committee understood.

23 The matter of the timing and the procedures within the
24 Committee are, I think, of importance. We have to take the veto
25 first in the Senate, and we have a situation which I discussed

1 briefly with Senator Cooper yesterday and with Senator Montoya,
2 who is the Chairman of our Subcommittee on Economic Development,
3 and it relates to certain action which is taking place in the
4 House in reference to not just the authorization, but the
5 actual appropriation of funds for the Appalachian program and
6 the related programs possible -- I am not sure about this --
7 until August 6.

8 Barry, would you clarify what I have said, if it needs
9 to be, or spell out any additional information to the Members.

10 Mr. Meyer. I think you have covered everything that has
11 to be covered. The papers will probably be referred back to
12 the Senate sometime tomorrow, if they follow their normal
13 pattern of transportation.

14 The Senate is involved in a rather difficult little dis-
15 cussion right now. The conference report on the draft bill was
16 brought back and the question is how one when returned to committee
17 can have the veto message referred back to the committee.

18 Senator Randolph. It is my suggestion -- not recommendation
19 at this point -- that we do nothing in terms of attempting to
20 have a meeting of the full committee prior to the beginning of
21 the July 4 holiday. I am told indirectly by the Leadership
22 in the Senate that it is the hope that on Thursday there will
23 not be business in the Senate. And so we have only tomorrow, and
24 if there isn't business in the Senate, I can understand Members
25 leaving Washington.

1 Now, with the August 6 date, and that as I understand
2 is binding now, there is no problem of funds?

3 Mr. Meyer. No.

4 Senator Randolph. So we would, John, think in terms of
5 setting a date after the holiday over July 4, to have the
6 committee come together and thoroughly discuss the matter,
7 because I would want the membership generally, and I know they
8 would want to participate in the discussion.

9 It is not often, frankly, that we have a veto of a bill
10 that has come from our committee. There have been vetoes
11 from other sources, but I am not sure that -- I can't recall
12 just quickly that we have had this situation.

13 But I want us to be careful, and since we are not under
14 the gun, as it were, with the end of June, I would suggest
15 that we just set a date that is agreeable, Senator Cooper, to
16 you, and our colleagues, for a thorough discussion, and we
17 will also have some briefing papers, I think, as to courses that
18 the committee might desire for us to think of in reference to
19 procedure.

20 Senator Cooper. I certainly appreciate your courtesy
21 in bringing this matter up. I would like to suggest, while
22 Members of the Senate are present, if it is going to be post-
23 poned until we return, it ought to be postponed long enough
24 until a date we can reasonably expect Members to be here.

25 I don't think they will all flow back in here the day after

1 July 4. Maybe not for a week. I don't know. It depends on
2 what the schedule is in the Senate.

3 Senator Randolph. Would the Committee, those of you here
4 today, permit your Chairman to keep in very careful and close
5 touch with the situation and confer also with Senator Cooper?

6 Senator Cooper. Do you have any particular date in mind?

7 Senator Randolph. No, I do not, except that we will check
8 that very carefully with you today, John, and with other
9 Members, to see if our own Members are planning on being here.

10 I think it is a matter of Senate attendance, but essen-
11 tially I would want to try to accommodate all the Members of
12 the Public Works Committee.

13 Thank you, then, Mr. Chairman.

14 Is there anyone who wanted to comment further?

15 Senator Boggs. No, but before you leave, Mr. Chairman,
16 at some point I wanted to ask Senator Muskie if we could
17 bring up for just a quick look at this permit system, as it
18 is being applied by the Corps of Engineers now, just briefly,
19 and if you wish, the Director of the Delaware River Basin
20 Authority, Jim Wright, who has had some real studies made
21 of the thing, could be here this afternoon.

22 He has to be in Philadelphia this morning, but after
23 this little, quick look at it, if you would want him here to
24 talk informally, or to ask him questions, he could be here
25 this afternoon at 4:00.

1 Senator Muskie. We have an Executive Session scheduled
2 this afternoon. There are going to be a lot of votes on the
3 Floor.

4 Senator Randolph. I believe one or two are definite as
5 to the time. There is another one that will apparently come
6 shortly thereafter. I have been checking that. Maybe 2:30.

7 Senator Boggs. But while we are here in this group, if
8 we could just take a quick look, we will use this little chart.

9 Mr. Jorling. What the Delaware Basin did, after it was
10 faced with the Refuse Act program, and was a little uncertain
11 as to what it meant, was have a system analyst take the regula-
12 tions and the applications form and make an analysis of what
13 steps were required to comply with the permit and go from the
14 point of initiation of the program to the point where permit
15 is actually issued.

16 What they did is they divided into organizational groups.
17 State and local authorities and applicants comprise the first
18 three columns. The DRBC occupies this column and the Corps
19 of Engineers occupies several columns, recognizing the section
20 office, the division office and the district office, EPA
21 regional office and the Administrator's office, Washington
22 office, the Department of Interior, and the same breakdown for
23 the Department of Commerce.

24 They take it through all the steps that are required by
25 all of the agencies involved before permit is actually issued.

1 The applicant must initiate the process, and the first involve-
2 ment is, of course, concentrated in the DRBC in the State.
3 DRBC, in this case, is the certifying agency under our law.
4 That means they are the ones required to file.

5 This is where the DRBC signed off as meeting water quality
6 standards. From that point down to the point where the permit
7 is actually issued, it is all Federal involvement, with four
8 agencies involved, the Corps of Engineers, Environmental Protection
9 Agency, Department of Interior and Department of Commerce.

10 All this area here is the DRBC in its analysis of the
11 water quality parameters. Down here is the final shot at the
12 Corps of Engineers and through the Secretary of Interior and the
13 Secretary of Commerce. They are the last ones that have input
14 into the Corps of Engineers and the permit is issued by the Corps.

15 This is the sum total of potential steps and it is not
16 necessary that all steps be gone through in every permit, but
17 the maximum number with the maximum number of issues is 90
18 steps ---

19 Mr. Billings. It is 70 steps.

20 Mr. Jorling. Seventy steps.

21 Senator Muskie. Don't exaggerate. (Laughter.)

22 Senator Bentsen. That sounds so much better. (Laughter.)

23 Mr. Jorling. On this question here, which I think is
24 critical, the Environmental Protection Agency was up here in the
25 executive section, and in going through their analysis of how

1 this program conforms to our program, I asked them for the
2 record whether or not they could assure a State or industry
3 that the permit issuing from the Corps would be identical
4 to the permit that the State has issued for water quality,
5 and that the Environmental Protection Agency agrees with it,
6 and the answer is no, because the Secretary of Interior and
7 the Department of Commerce under the Refuse Act program have
8 authority to require a different effluent standard on the basis
9 of fish and wildlife.

10 No one will know until down here what the final effluent
11 requirements are going to be. For this reason, for instance,
12 the State of California says we don't know if we can certify
13 the water quality, because we have them under permit with the
14 waste discharge requirement, and that may be at variance from
15 what the Federal Government finally issues.

16 Senator Tunney. What is your suggestion, Senator Boggs?
17 (Laughter.)

18 Senator Muskie. For these 70 steps which are required,
19 what time frame is involved?

20 Mr. Jorling. Jim's estimate was in the minimum if the
21 mails were on time -- the calculation of the system analyst
22 was two days for the mail -- and if an immediate decision
23 was rendered by the decision maker in every instance, the
24 minimum time was four months. The maximum time is three years.

25 Mr. Billings. The Corps testified it would take three to

four years to process all of the permit applications they expect to get, and that is 100,000.

Mr. Jorling. Meanwhile, there are States like California, like Pennsylvania, many States which have all of the discharge requirements under permit, have all of the information on effluents which is being duplicated by their program. Section 303 says they will achieve these standards in three years.

Senator Boggs. To answer your question, I don't have an exact solution, although I certainly think in this legislation we undoubtedly have got to look at this permit system that is operating and try to integrate it into our Federal-State system for enforcement.

Senator Muskie. The two systems have got to be conformed in some way.

Well, I think it would be very helpful with the Executive Session that we have just had, while we are still reasonably fresh in our recollection of that, to have this, this afternoon.

Senator Boggs. He is a professional in this field.

Senator Muskie. Can you find out what room we will be in?

We can have that. I think it would be helpful. That certainly is a Rube Goldberg if I ever saw one.

Senator Tunney. It is terrible.

Senator Muskie. It is incredible. Someone didn't think that thing through before getting snarled up in it. All you have to do is blow that up and mount it on the wall and have a

1 public hearing. (Laughter.)

2 Mr. Billings. Who did you want to mount on a public wall?

3 Senator Muskie. Don't ask me a second time. (Laughter.)

4 While we are waiting for that, Senator Bayh had an
5 amendment, I understand, to the citizen suit provision. Why
6 don't we ask him about that.

7 Senator Bayh. This is designed to include within the
8 present enforcement provision, as one of the provisions of the
9 Act to which a citizen can bring a suit against violation of the
10 permits requirement.

11 If a permit is granted and the permit is violated, we
12 would include that in addition to the other reasons stated in
13 the present act.

14 Senator Muskie. You mean the permit under the Refuse Act?

15 Senator Bayh. Yes. Feeling that this would ease the burden
16 that is on the Federal Government to prosecute permit violations.
17 I don't know what the exact figures are, but it is an under-
18 estimation to say the Government is understaffed to pursue the
19 number of permit violations that it is reasonably expected to
20 incure.

21 Senator Tunney might know more about it. Somebody told
22 me they had one and one-half members to police all the permits
23 in the total area of Southern California. It was just an absolute
24 impossible task to bear.

25 What we do is to change Section 2, so that as far as the

1 cost involved, in addition to giving the Court leeway to assess
2 cost and reasonable attorney's fees, we suggest that when the
3 case has been successfully prosecuted, the Court shall allot
4 such cost and reasonable attorney's fees.

5 The fines and penalties, of course, are those that are
6 already under Section 309. We don't change the fines and penalties
7 but we do give a citizen the right to successfully prosecute
8 the violation of the permit.

9 Senator Boggs. Outside of applying it to the permit system,
10 is it different than we have in the Air Pollution Act?

11 Senator Bayh. No.

12 Senator Muskie. Except with respect to the cost. It
13 is entirely discretionary in the Air Pollution Act. This
14 would make it mandatory if it is successfully prosecuted.

15 Senator Bentsen. If it is unsuccessful, it wouldn't make
16 it mandatory that they be placed against him?

17 Senator Bayh. No.

18 Senator Bentsen. You have nothing that discourages frivolous-
19 ness.

20 Senator Bayh. That is discouraged under common law.

21 Senator Muskie. Of course the reason why we gave the
22 court discretionary authority to award the cost was to give the
23 court the power to discourage frivolousness. I can't recall
24 now why we made it discretionary both in the case of successful
25 or unsuccessful suits, a conference compromise, I guess.

1 Senator Bayh. There is no question that this is a more
2 significant burden and I think probably it is a more significant
3 incentive. I asked that same question when we first started
4 discussions.

5 I want to stop pollution. I don't want industry to be
6 bogged down with one frivolous suit after another. I just
7 don't think that is going to happen. The history of today would
8 lead us to believe it is not going to happen, however,
9 inasmuch as there is going to be some significant cost
10 involved in prosecuting some of these, but if we find someone
11 who has indeed been doing it, and they know that they are doing
12 it, then I have no hesitancy to put the hammer on them.

13 Senator Cooper. Abatement after a permit has been issued
14 then, in effect, is what you are talking about. The Amendment
15 that you propose would become effective after all the pre-
16 conditions have been met and the permit issued. These are vio-
17 lations to that?

18 Senator Bayh. Yes. They are violating the permit.

19 Senator Cooper. Your provision would apply primarily to
20 abatement, then.

21 Senator Bayh. Yes. What we do John, is there are a number
22 of specifications, 305, 308, 307, to which citizen suits can be
23 directed. We just add to the list that is already there, the
24 violation of the permit.

25 Senator Cooper. You are talking about the language pro-
posed in the draft presently?

1 Senator Bayh. Yes, we are just adding the violation of a
2 permit to the other provisions that are already enumerated
3 on Page 41, feeling that inasmuch as there are going to be
4 several hundred thousand permits issued, that if we don't make
5 that a fail-safe mechanism, then we are really opening the
6 door to undercut everything else we do in the Act.

7 Senator Muskie. Well, we haven't decided yet what we are
8 going to do to conform the permit system to the Act. I would
9 think that it is the intent of the citizen suit provision to
10 cover the permits, and that this is what we will get to eventually
11 in the clarifying language. I see no problem with that, but
12 I have a question about one aspect of your amendment, and that
13 is whether or not it is the intent of that language which
14 reads, "or to apply the appropriate penalties or fines under
15 section 309 of this Act," whether it is the intent that the
16 court be empowered to impose criminal penalties as a result of
17 a citizen suit.

18 I wondered if that was the intent, or whether or not we
19 would want that clause in the citizen suit.

20 Senator Bayh. It is not the question, really, looking at
21 what we want to try to accomplish. We all want to stop the
22 pollution and what we are trying to do is to broaden the enforce-
23 ment capacity that exists presently.

24 I, for one, have no reluctance to say if a person is doing
25 the same thing, it shouldn't make any difference whether this

1 is first recognized and brought to the attention of the court
2 by the Government or an individual citizen. The question is,
3 is the fellow not complying. If he is, I don't want him touched
4 by anything. If he is not, I have no hesitancy ---

5 Senator Muskie. In effect, you would be making citizens
6 assistant U. S. Attorneys if you are talking about criminal
7 penalties.

8 Senator Bayh. Well, the court is the final determinate
9 as to whether the person is going to have to be subject to trial.

10 Senator Muskie. You want to have citizens have this kind
11 of initiative with respect to crimes across the board? You
12 know, a criminal act is something different than a civil act.
13 I am just opening a question, because your amendment raises
14 that. I have no final judgment on it.

15 Senator Bayh. I think that is a legitimate question to
16 raise. I come down on the side of including the language but if
17 that is going to be a tie-up in the committee, I would rather
18 have the other penalties included without the criminal sanctions
19 than to have nothing at all.

20 Senator Cooper. You would include jurisdiction to abate,
21 but also for damages?

22 Senator Bayh. Trying to keep it as simply as we could,
23 yes.

24 Senator Cooper. Possible judgment of this abatement and
25 civil damages; is that correct?

1 Senator Bayh. Plus criminal damage.

2 Senator Bentsen. I would be concerned with the criminal
3 aspect.

4 Senator Muskie. I would like to discuss this question of
5 criminal penalties. I think we ought to understand that.

6 Mr. Jorling. The intent of the section is tricky. If
7 you make eligible criminal sanctions in an individual prosecution
8 then you will change the whole nature of the contest. It will
9 then cause to be applied the criminal rules of procedure.

10 Senator Bayh. I am not tied up on the criminal aspect
11 of this thing.

12 Mr. Jorling. Our language to apply the appropriate penalties
13 of funds deal mostly with Page 27, 309(c)3 which subjects a
14 violator of a water quality standard or implementation plan
15 to a civil penalty of \$10,000 per day.

16 Mr. Brecker. As to Senator Cooper's point about civil
17 damages, I believe that the citizen suit under the Act would not
18 be a suit for the damages that I, as a citizen myself, would
19 suffer. It is an action to enforce the provision of the act.
20 It would have to be a different suit for me to say it was
21 ruining my house.

22 Senator Cooper. Yes.

23 Mr. Jorling. That is specifically rejected in this provision.
24 At the same time, those rights are preserved.

25 Senator Beall. I have one question. Not being an attorney,

1 I don't understand why you are changing Section (b).

2 Senator Bayh. What we are doing in Section (b), the court
3 under the present act has discretion to grant cost or not to
4 grant cost, whether the case is pursued successfully or un-
5 successfully, the way I read it.

6 What we are doing is if there is such a good case that
7 you pursue it successfully, then the cost shall be paid.

8 Senator Beall. Isn't that the general practice? Doesn't
9 the court generally award cost in suits of this nature where
10 the outcome is successful?

11 Senator Muskie. Let me give, as I recall, the development
12 of this provision in the Clean Air Act last year. As I recall
13 the Senate version we reported out and adopted, we gave the
14 court authority to award cost to the prevailing party.

15 The court would just award cost against the citizen only
16 in the case of frivolous suits, but we want to leave it to the
17 court to judge, because we made that discretionary and we
18 applied the discretion across the Board, successful suits as
19 well as unsuccessful suits.

20 Now the question is, should we go back and do what
21 Senator Bayh has proposed, which is a further refinement.

22 Mr. Cummings. Another way of looking at it, there was
23 a fear that if there were mandatory awards to a citizen who
24 prevailed, that would discourage the court from awarding cost
25 to citizens in cases where they had a good case but didn't win.

1 Senator Bayh. How does that follow?

2 Senator Muskie. That is the reason, yes. I couldn't
3 remember that.

4 Mr. Cummings. If we require the award, that might
5 tend to discourage plaintiffs, because in cases where a strong
6 case was brought in the public interest, but it was close,
7 if the citizen didn't win, they couldn't get their cost.

8 Mr. Billings. Isn't there a case where the citizen may
9 be successful in achieving abatement without the Court issuing
10 a final order?

11 Under this language, the citizen would then not be able
12 to ---

13 Mr. Brecker. We cover that. The second sentence adopts
14 the language, "the court, in issuing any final order in any
15 action brought pursuant to this section, shall award costs of
16 litigation (including reasonable attorney and expert witness
17 fees) to any party in cases in which citizens or citizen
18 groups successfully maintain an action under subsection (a) of
19 this section. The court may award costs of litigation (including
20 reasonable attorney and expert witness fees) to any party,
21 whenever the court determines such award is appropriate."

22 So if a settlement were reached between the parties
23 or the matter did not go to final judgment, it would be
24 within the discretion of the court to give the cost to the
25 citizen.

1 I don't think he would be discouraged because there is
2 the other sentence.

3 Senator Tunney. Isn't this the British system? In
4 British courts don't they award damage in ---

5 Senator Bayh. The winner always get costs.

6 Senator Tunney. According to your language what would be
7 the effect of that rule?

8 Senator Bayh. It discourages frivolous suits, because
9 people who don't win, don't get costs, and they have to pay
10 costs. Now those are in regular civil damage suits.

11 Senator Tunney. I was thinking of what Senator Bentsen
12 said. If you are going to give automatic costs to the successful
13 plaintiff, then why not give automatic cost to the successful
14 defendant, if that is the British System, and if it is working
15 over there, and discouraging frivolous suits?

16 On the other hand, it does not discourage a person who
17 feels that he has a good suit. Why not just adopt the British
18 rule, lock, stock and barrel?

19 Senator Bayh. What concerns me is the point raised a
20 minute ago. I would rather leave that at the court's
21 discretion, because there might be a very good case, or there
22 might be a marginal case, and this would discourage citizen
23 suits in a close area.

24 Senator Bentsen. I think that is the best part of the
25 argument, equity on both sides. I, for one, am generally prone

1 to let the judge have the discretion both for the plaintiff
2 and the defendant, when it comes to allocating cost, because
3 I don't think we can sit here and participate in the delicate
4 balance in every one of these things.

5 Senator Tunney. One point we ought to consider is under the
6 1964 Civil Rights Act, Article 7, talking about the discrimina-
7 tion, we had the same provision where the judge can award
8 cost, and apparently my staff research indicates that never
9 has a defendant been awarded the cost.

10 Mr. Jorling. I think in a Civil Rights case, it is very
11 difficult to say that it is harassing or frivolous because
12 of the subjective nature of the act, whereas, if the man is
13 in compliance and his monitoring equipment shows he is
14 in compliance, and an action is brought, he could bring
15 that evidence to the court with an affidavit of the regional
16 State people or regional Federal people, and the court would
17 find that as frivolous or harassing action.

18 I think it is a reference point of violation of adminis-
19 tratively set standards as distinct from a civil rights
20 violation which is so subjective in its determination, and
21 this may allow this to become more effective.

22 Senator Bayh. Of course the converse is also true, if the
23 State and regional people show the fellow is violating, he
24 knows it himself, and thus the justice of assessing cost is
25 somewhat greater.

1 Mr. Jorling. I think another point on the question of
2 whether or not if you have a mandatory requirement, that if the
3 final order is entered in favor of the plaintiff, that the
4 defendant shall bear the cost might cause some district
5 courts to apply the converse, even if it isn't in the
6 statute.

7 There is the great disparity in defendants cost and
8 plaintiffs cost in these kind of actions, and the great
9 disparity in plaintiffs capability and defendants capability
10 to pay cost, the United States Steel versus two attorneys
11 that are doing this for some conservation organization.

12 The only thought on that point, Senator Bayh, is it
13 might be more appropriate to strongly recommend in the
14 report that where an action goes to final order, the cost
15 should be awarded by the court to the plaintiff. If the fear
16 that I expressed is a real one, and I express it only as one
17 of personal opinion, that if this action appears, some district
18 court judges are going to apply it conversely, even though
19 it doesn't appear in the statute.

20 Mr. Brecker. If you struck out any part of the first
21 sentence and just applied it to plaintiffs, at that point the
22 next sentence, I feel, goes to Senator Bentsen's question,
23 because if it is a frivolous suit, the court can award the
24 cost. It can award the cost to any party when ever the court
25 feels such award is appropriate, if it is a successful suit.

1 I think the average public interest lawyer or environmental
2 lawyer deserves to have its cost paid. It has done the public
3 a service and saved the Government the trouble of abating
4 pollution.

5 Mr. Jorling. I realize that. The only question I have is
6 if the plaintiff feels that the issue is of great significance,
7 the volume of pollution from a particular source is so great,
8 and the alleged violation is one in say, the plus or minus 10
9 region, and it says in the public interest we should clarify
10 whether or not that large polluter is in violation or not,
11 and we think we have evidence to establish it is, if they are
12 faced with the possibility that at the end of the line the
13 defendant is going to be able to receive cost from the plaintiff,
14 the plaintiff won't initiate action in the first instance
15 because the defendant is United States Steel, and the action is
16 going to be an extremely expensive operation.

17 So if there is any possibility that costs are going to be
18 awarded to the defendant, they probably won't bring the action.

19 Senator Bayh. But short of saying that, the defendant
20 may never get cost.

21 Mr. Jorling. Right, now the test of public interest.
22 The court decides whether it is in the public interest to
23 award costs. It is not referenced to whether or not there is
24 a successful verdict, which is what would be done by the first
25 sentence.

1 Senator Bayh. Aren't we in as good a position, if we are
2 talking about a national policy, to determine whether U.S.
3 Steel stops polluting, whether that is in the public interest
4 or not, and the court sits there with all of the nuances
5 involved at the local scene?

6 Mr. Jorling. I don't disagree with that at all. The
7 problem is, if it is interpreted in a close case, even though
8 the issue is in the public interest, to award cost to the
9 defendant. Even if they go through the entire matter and
10 reach the conclusion that the defendant is awarded the verdict
11 and the court says, well the plaintiff was entitled to cost
12 if he would have won, because you won, I am going to award
13 cost to you.

14 That will have the effect of, well, the issue was close,
15 and it is well that it is litigated, and we have reached a
16 conclusion, but I won't award the cost because it was in the
17 public interest. It is only a reservation of what will be the
18 effect in the first instance on a person's motivation to bring
19 action if there is a mandatory payment at the end of that
20 action.

21 That is my only reservation.

22 Senator Bayh. We make a definite distinction in the law
23 by including the language that is in there if we accept this
24 amendment, which gives the court the right to award cost.
25 That is pretty well the way it is now in the Clean Air Act, and

1 what we are saying is if this is sufficiently won, then the
2 cost shall be awarded.

3 Senator Muskie. The point that Tom makes is a legitimate
4 point. I don't know that I have the answer to it. But if you
5 leave it to the judge's discretion, he may decide, "Damn it, I
6 don't care what they meant. In any judgment it is only equitable
7 if you are going to give cost to the plaintiff if he prevailed,
8 then the same for the defendant."

9 That is the way the judge may exercise his discretion.
10 I guess that is in the evaluation of the individual judge.

11 May I suggest since we are not having votes on each of
12 these issues as they come along, that we include Senator
13 Bayh's version in the committee print when we have it, and
14 dispose of it after we digest it, rather than try to resolve
15 it now, especially with only three of us remaining.

16 I think all of these interpretations are interpretations
17 we are going to consider and we will have time to do that.

18 Senator Tunney. Just one point in favor of the Bayh
19 amendment.

20 Senator Bayh. Just one? (Laughter)

21 Senator Tunney. Another one. If a person were bringing
22 an action just for an injunction, and he goes down and wants
23 to get a pretty good attorney to handle the suit for him, and
24 there is no question of damages so that the attorney is not
25 going to have any opportunity to share in the damages, the

1 attorney might be discouraged from taking the case if he
2 thought that there was going to be a court discretion in the
3 awarding of litigants cost, plaintiff's costs; whereas, if
4 you had a mandatory provision there, the attorney might be
5 encouraged to take the case, if it was just for injunctive
6 relief.

7 As a practical matter, I can see where the impoverished
8 plaintiff, or at least the plaintiff that doesn't want to
9 put up \$2,000 or \$3,000, could be discouraged from bringing a
10 case where damages are involved. I throw that into the
11 considerations.

12 Senator Muskie. We can propose all kinds of hypothetical
13 situations as to whether or not we take discretion away or grant
14 it.

15 Senator Bayh. I suggest we do both. (Laughter)

16 Senator Muskie. With respect to both the plaintiff and
17 the defendant. (Laughter.)

18 Well, we are scheduled then to resume at 3:00 this
19 afternoon, in EF-100.

20 (Whereupon, at 12:20 p.m., the hearing recessed, to
21 reconvene at 3:00 p.m. the same day.)
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23
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25

